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No. 86-1089

In the Supreme Court of the United States

OCTOBER TERM, 1986

STACEY LYNN MERKT AND
JOHN B. ELDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioners' claim that the Free Exercise Clause barred their convictions for violating federal immigration laws.

2. Whether the evidence was sufficient to support petitioner Merkt's conviction for conspiracy to violate the federal immigration laws.

3. Whether petitioners' convictions should be reversed because they were the product of unreliable, coerced testimony.

4. Whether the district court improperly admitted into evidence identifications of petitioners based on impermissibly suggestive photographic identification procedures.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. IV) is reported at 794 F.2d 950.[1] The opinion of the district court (Pet. App. I; see Pet. App. II) denying petitioners' motion to dismiss the indictment is reported at 601 F.Supp. 1574.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1986 (Pet. App. IV). A petition for rehearing was denied on September 4, 1986 (Pet. App. V). On October 28, 1986, Justice White extended the time within which to file a petition for a writ of certiorari to and including December 3, 1986 (Pet. App. VII). The petition for a writ of certiorari was filed on December 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioners filed three separate versions of an appendix to their petition for a writ of certiorari. The contexts of the three versions are mostly duplicative. Our references to the appendix to the petition are to the most inclusive version.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of conspiring to transport illegal aliens within the United States (Count 4), in violation of 18 U.S.C. 371 and 8 U.S.C. 1324(a)(2). Petitioner Elder was also convicted on one count of conspiring to bring into and land in the United States illegal aliens (Count 1), in violation of 18 U.S.C. 371 and 8 U.S.C. 1324(a)(1), on two counts of landing illegal aliens (Counts 2 and 3), in violation of 8 U.S.C. 1324(a)(1), and on two substantive counts of transporting illegal aliens within the United States (Counts 5 and 6), in violation of 8 U.S.C. 1324(a)(2).[2] Petitioner Elder was sentenced to 150 days' imprisonment, to be served at a designated half-way house. Petitioner Merkt was sentenced to 18 months' imprisonment, with all but 179 days suspended in favor of three years' probation. The court of appeals affirmed (Pet. App. IV).

1. At trial, the government established that in November 1984, two adult El Salvadoran citizens, one male and one female, and three El Salvadoran juveniles unlawfully entered the United States. They entered by crossing the Rio Grande, and they were met by petitioner Elder on the American side (Pet. App. IV, at 7998). Elder then drove the aliens from the border to Casa Romero, a "refugee sanctuary" that he directed in San Benito, Texas, where the aliens stayed for approximately 15 days (*ibid.*). While at Casa Romero, the adult male alien, Jose Andres Mendez-Valle, became acquainted with petitioner Merkt, who was a staff volunteer there (*ibid.*). In mid-November, Mendez-Valle gave Merkt $100 to purchase bus tickets to Houston for the five aliens (*id.* at 8008). On November 21,

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[2] Petitioner Merkt was acquitted on two counts of unlawfully transporting illegal aliens (Counts 7 and 8).

1984, Merkt drove the five aliens to the bus station in McAllen, Texas, where they boarded a bus to Houston (*id.* at 7998, 8008).

Border Patrol agents subsequently arrested the five aliens en route to Houston at the Weslaco, Texas, bus station (Pet. App. IV, at 7998). The agents gave the aliens *Miranda* warnings, and after the agents learned that the aliens might have been smuggled into the country, the agents took the aliens to McAllen, Texas, for further questioning (*id.* at 7998-7999). At McAllen, Mendez-Valle generally described petitioners Merkt and Elder and he identified both from photographic lineups (*id.* at 7999). He also later identified both petitioners in court (*id.* at 7999, 8009). The adult female alien was unable to identify either petitioner (*id.* at 7999).

2. Prior to trial, the district court denied petitioners' motion to dismiss their indictment. Petitioners alleged, inter alia, that the Free Exercise Clause barred their criminal prosecution because their religious practices included providing shelter and transportation for Salvadoran aliens. Pet. App. I; Pet. App. II, at 3. The district court concluded that the federal government had demonstrated that any limitations on petitioners' religious beliefs were "essential to accomplish a compelling governmental interest" and "did not exceed the least burdensome method of accomplishing the Government's purpose without infringing First Amendment rights" (Pet. App. I; Pet App. II, at 4, 7-13 (citations omitted)).

During the trial, petitioners objected to the admission of Mendez-Valle's testimony in its entirety on the ground that his testimony was the product of prosecutorial misconduct, including bribes and threats (Pet. App. III, at iv). Petitioners also objected to the admission of Mendez-Valle's identification of petitioners on the ground that the identification procedures utilized by the government were impermissibly suggestive (*id.* at i-iii). The district court

denied both motions (Pet. App. III). The court concluded that the photographic identification procedures used in Mendez-Valle's identification of petitioner Elder were not impermissibly suggestive and that procedural problems with the identification of petitioner Merkt were overcome by other indications of the reliability of the identifications (*id.* at i-iii).

3. The court of appeals affirmed (Pet. App. IV, at 7995-8020). The court upheld the district court's rejection of petitioners' Free Exercise claim and its denial of petitioners' motion to exclude Mendez-Valle's testimony, including his identification of petitioners. The court of appeals also rejected petitioners' claim that the evidence was insufficient to support their convictions. *Ibid.*

ARGUMENT

1. Petitioners claim (Pet. 1-9) that the Free Exercise Clause bars their convictions for violations of federal immigration laws, because their assistance to undocumented illegal aliens was prompted by their religious beliefs. They claim (*id.* at 6), moreover, that this Court's review is warranted because the court of appeals refused to apply a "strict scrutiny" test in determining the validity of petitioners' convictions, as required by *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Contrary to petitioners' claim (Pet. 9), the court of appeals did not hold that their convictions are "exempt from constitutional review" because the relevant criminal statutes concern federal immigration policy. Nor did the court of appeals fail to apply "strict scrutiny" analysis in evaluating the merits of petitioners' Free Exercise Clause claim. "[I]n an abundance of analytical caution," the court of appeals explicitly applied a strict scrutiny analysis. Under that test, the court held that the convictions were

valid, after assessing the burden imposed by the criminal statutes on petitioners' religious activities, the government's interest in uniform law enforcement, and the availability to the government of less burdensome means of achieving its objectives (Pet. App. IV, at 8002-8006).

First, the court of appeals correctly noted that the burden on petitioners' religion was not impermissible, because petitioners had, in effect, "voluntarily assumed" the burden (Pet. App. IV, at 8003). Although petitioners' criminal acts may have been prompted by their sincere "religious motivation" (*ibid.*), the evidence at trial did not support the conclusion that their activities were effectively compelled by their religion, as were the religious activities at issue in *Wisconsin* v. *Yoder* and *Sherbert* v. *Verner*. Hence, contrary to petitioners' claim (Pet. 2), this case does not involve a confrontation between federal criminal laws and petitioners' "non-avoidable duty to assist refugees." As the court of appeals pointed out (Pet. App. IV, at 8003), petitioners "could have assisted beleaguered El Salvadorans in many ways which did not affront the border control laws[,] * * * [but they] chose confrontational, illegal means to practice their religious views."[3]

Second, the court of appeals correctly determined (Pet. App. IV, at 8003-8004) that the federal government had demonstrated a "compelling state interest in the * * * uniform enforcement of border control laws" and that "engraft[ing] judicial exceptions * * * [for] El Salvadorans * * * would create a preference utterly at odds with the fine balancing of national-origin quotas, visa preference

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[3] Petitioners erroneously assert (Pet. 11 n.5) that the court of appeals improperly questioned the sincerity of their religious beliefs. The court of appeals simply drew the appropriate distinction between evidence establishing that certain conduct was religiously *motivated* and evidence establishing that the conduct was religiously *mandated*. The court concluded that only the former had been established in this case.

tables, and alien residency requirements promulgated and enforced pursuant to [federal immigration laws]." Contrary to petitioners' contention (Pet. 10, 12), therefore, the court of appeals described the specific harm that would be caused in this case by making an exception to the federal immigration laws. The court did not fail to identify a compelling governmental interest supporting the application of the immigration laws to petitioners' conduct.

Finally, the court of appeals correctly rejected (Pet. App. IV, at 8004-8005) petitioners' claim that criminalization of the federal immigration laws was impermissible because the government could achieve its policy objectives through "less restrictive means," such as the deportation of unlawful aliens or the confiscation of vehicles used in unlawful smuggling activities. As the court of appeals found (*ibid.*), the former "catch-me-if-you-can" scheme would not adequately meet the law's objectives, and the latter option would not diminish the efforts of individuals such as petitioners to evade the requirements of federal law.

2. Petitioner Merkt argues (Pet. 14-17) that her conspiracy conviction should be reversed because it was based exclusively on her association with other members of a religious community. Petitioner assumes (*id.* at 14, 15) that the only evidence supporting her conspiracy conviction was "the fact that she worked at the religious shelter," because the jury acquitted her on the other counts in the indictment. Therefore, she argues, the jury must have accepted her claim that she was "in no way involved in * * * transportation [of the illegal aliens]." It is well settled, however, that acquittal by a jury on certain counts is irrelevant to the inquiry whether the jury's conviction of a defendant on other counts was supported by sufficient evidence. "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced

at trial could support any rational determination of guilt beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient." *United States* v. *Powell*, 469 U.S. 57, 67 (1984) (citations omitted); see *Dunn* v. *United States*, 284 U.S. 390 (1932). Hence, rather than presume that the jury concluded that petitioner Merkt did not participate in the transportation of the illegal aliens, it is proper to consider all the evidence bearing on the conspiracy count, as the court of appeals did (see Pet. App. IV, at 7998, 8008). Whatever the jury's reason for acquitting Merkt on the substantive counts, it could properly have based her conspiracy conviction on the evidence that she had participated in the transportation of the aliens or at least was a party to the transportation scheme. This case therefore does not raise the issue whether Merkt may be convicted for conspiracy merely on the basis of her association with other members of a religious community.

3. Petitioners also claim (Pet. 18-23) that their convictions should be reversed because they were based on coerced testimony that the government obtained by offering Mendez-Valle the "promise of life" in exchange for his testimony against petitioners. As the court of appeals found (Pet. App. IV, at 8013-8014), however, the facts presented at trial did not establish that Mendez-Valle's testimony was the product of prosecutorial misconduct. Although the government advised Mendez-Valle that the children who accompanied him across the border would be reunited with their parents in this country, the government made no promises in exchange for his testimony (*ibid.*). Mendez-Valle, moreover, never claimed that he was coerced into offering false testimony (*id.* at 8014).[4] The

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[4] Petitioners also erroneously suggest (Pet. 22) that the government purposefully retained custody of the alien children during the trial in an effort to coerce Mendez-Valle into testifying for the government. As the court of appeals found (Pet. App. IV, at 8013), the children re-

district court did not err therefore in admitting Mendez-Valle's testimony into evidence.

4. Finally, petitioners contend (Pet. 24-31) that their convictions should be reversed because the district court improperly permitted Mendez-Valle to identify them at trial. The court of appeals correctly rejected that claim (see Pet. App. IV, at 8006-8009). The photographic lineup that included petitioner Elder was not impermissibly suggestive.[5] Although, as the government admitted in the court of appeals (*id.* at 8007), the photographic lineup that included petitioner Merkt was impermissibly suggestive, Mendez-Valle's identification was amply supported by other indicators of its reliability. That identification was therefore properly admitted. See *Manson* v. *Brathwaite,* 432 U.S. 98, 114 (1977); *Simmons* v. *United States,* 390 U.S. 377, 384 (1968).

Petitioners are wrong in asserting (Pet. 25-29) that there was no evidence supporting Mendez-Valle's identification and that the court of appeals improperly relied on factors that were the "direct product of the corrupting process." The court of appeals considered several factors that significantly bolstered the reliability of Mendez-Valle's identification: (1) Mendez-Valle had an ample opportunity

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mained in the government's custody at the time of the trial only because neither the parents nor a responsible guardian came forward until after the trial to take custody of them.

[5] The photographic lineup that was used for the identification of petitioner Elder included 11 photographs, seven of which, including a picture of Elder, were from newspaper clippings. As noted by the court of appeals (Pet. App. IV, at 8007), the photographs provided Mendez-Valle a fair cross-section of physical appearances; the seven newspaper pictures "depicted caucasian males of varying facial and feature characteristics but of the same general age and description. Three of the men * * * wore glasses, while two had mustaches." Mendez-Valle concluded that petitioner's picture "looked very much like" the individual who assisted the five aliens across the border (*ibid.*).

and incentive to focus on Merkt during the relevant period; (2) he provided a fairly accurate description of Merkt's physical appearance, her name, and her car prior to the photographic lineup and only a few hours after he had seen Merkt;[6] and (3) he identified Merkt positively and unequivocally both prior to and during the trial—indeed, he testified that he would have been able to identify Merkt in the absence of the photographic lineup. See Pet. App. IV, at 8008-8009. All of these circumstances bore on the reliability of the identification of Merkt and therefore were properly considered by the court of appeals. Because Mendez-Valle's accurate descriptions of petitioner Merkt's appearance, her name, and her car occurred prior to the photographic lineup, petitioners' claim that the court of appeals erroneously relied on the "direct product of the corrupting process" in admitting the identification is plainly without merit.

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[6] As noted by the court of appeals (Pet. App. IV, at 8008), Mendez-Valle accurately "described [Stacey] Merkt as a short Anglo light-skinned woman with curly or kinky yellowish-blonde hair. He said her name was phonetically similar to 'Daisy'." As further noted by the court (*id.* at 8006-8007), Mendez-Valle also accurately described petitioner Elder prior to the photographic lineup "as a tall man with a mustache who possibly wore glasses and had a name phonetically similar to 'Mr. Mack' or 'Mr. Yack.' (Elder is known as 'Jack.')."

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
ROBERT J. ERICKSON
Attorney

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